No. 84-127

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

*Petitioner,*

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR PETITIONER

LAWRENCE E. WALSH
Crowe & Dunlevy
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
*Counsel of Record for Petitioner*

RICHARD C. FORD
*Of Counsel*

GUY MILLER STRUVE
OGDEN N. LEWIS
WHITNEY L. SCHMIDT
Davis Polk & Wardwell
1575 I Street, N.W.
Washington, D.C. 20005
(202) 789-7100

VINCENT H. COHEN
ROBERT B. CAVE
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500
*Counsel for Petitioner*

64 pp

## Questions Presented

1. If a Federal District Court finds that an attorney has been guilty of misconduct in a case pending before it, may it disqualify the attorney from further participation in the case?

2. In such a case, are the District Court's findings of fact protected by the clearly erroneous rule, and is its determination subject to reversal only for abuse of discretion?

3. May an attorney be disqualified for eve of jury selection dissemination to the most widely circulated local newspaper of material previously ruled inadmissible and prejudicial (a) with intent to circumvent the orders of the District Court; (b) with intent to prejudice the defendant's case; and (c) after similar conduct in a previous case?

4. Is an order disqualifying counsel in a civil case subject to interlocutory appeal in light of *Flanagan v. United States*, 104 S. Ct. 1051 (1984)?*

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* The caption of the case in this Court contains the names of all parties to the proceedings in the court below. Petitioner (now known as Merrell Dow Pharmaceuticals Inc.) is a subsidiary of The Dow Chemical Company. The subsidiaries and affiliates of The Dow Chemical Company that have outstanding securities in the hands of the public are listed in the footnote on the first page of the Petition for a Writ of Certiorari in this case.

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RICHARDSON-MERRELL INC.,

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v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF FOR PETITIONER

Petitioner Richardson-Merrell Inc., the defendant below, seeks reversal of a decision rendered by the United States Court of Appeals for the District of Columbia Circuit (Circuit Judges Wald and Mikva, with District Judge Richey concurring in a separate opinion), which reversed an order of the United States District Court for the District of Columbia (Honorable Norma Holloway Johnson, U.S.D.J.) disqualifying respondents James G. Butler and Nicholas R. Allis as two of the trial counsel for plaintiffs in this action.

## Opinions and Judgments Below

The opinions delivered in the Court of Appeals are reported at 737 F.2d 1038, and are set forth in the Appendix to the Petition for a Writ of Certiorari (Pet. App. 1a-71a). The judgment of the Court of Appeals is set forth at Pet. App. 81a. The Memorandum Opinion of the District Court is not yet reported, and is set forth at Pet. App. 72a-78a. The order of the District Court appealed from is set forth at Pet. App. 79a-80a.

## Jurisdiction

The judgment of the Court of Appeals was entered on May 29, 1984 (Pet. App. 81a). Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on July 17, 1984 (Pet. App. 82a-85a). The petition for a writ of certiorari herein was filed on July 24, 1984, and was timely under 28 U.S.C. § 2101(c). The petition for a writ of certiorari was granted by an order filed on October 15, 1984 (J. A. 342). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

## Statute and Rules Involved

28 U.S.C. § 1291; Fed. R. Civ. P. 52(a); Rules 1-4, 4-3(IV), and 4-3(VIII) of the United States District Court for the District of Columbia; Disciplinary Rules 1-102(A), 2-110(B)(1), 5-105(D), 7-102, 7-106, 7-107(H)-(J), and 7-108(A)-(B) of the District of Columbia Code of Professional Responsibility; and Sections 632 and 633.5 of the California Penal Code are set forth verbatim at Pet. App. 86a-99a.



## Statement of the Case

This is a product liability case in which the plaintiffs claim that defendant's prescription drug Bendectin caused the birth defects of the infant plaintiff, Anne Elisabeth Koller.* Among the central issues in the case are whether Bendectin actually causes birth defects, and whether Mrs. Koller in fact took Bendectin during the first 40 days of pregnancy (J. A. 132).

The action was commenced on May 19, 1980 (J. A. 4). The basis for federal jurisdiction was diversity of citizenship under 28 U.S.C. § 1332 (C.A. App. 77**). Plaintiffs were represented by eight attorneys of record (C.A. App. 1, 2, 20, 21, 37, 64). On January 6, 1984, before the case proceeded to trial, the District Court found after holding evidentiary hearings that two of plaintiffs' counsel, James G. Butler and Nicholas R. Allis, were guilty of misconduct and should be disqualified from further participation in the case (Pet. App. 72a-80a).

### A. The Conduct of Butler and Allis

#### 1. Butler

The District Court entered a number of pretrial orders designed to preclude the plaintiffs from placing irrelevant and prejudicial categories of evidence before the jury:

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* The plaintiffs in this action were included among the members of a class defined in *In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation*, MDL No. 486 (S.D. Ohio June 18, 1984). A proposed class settlement was filed with the Court. The class certification order was vacated on October 26, 1984. *In re: Bendectin Products Liability Litigation*, No. 84-3710 (6th Cir. Oct. 26, 1984), *petition for rehearing filed* (Nov. 9, 1984).

** "C.A. App." citations are to the Joint Appendix in the Court of Appeals, a copy of which has been lodged with this Court.

(1) On October 19, 1982, the District Court entered an order barring references to defendant's prior association with thalidomide, a drug unrelated to Bendectin which defendant had licensed from its German developer and had tested in the United States in 1961 until it was exposed in Germany as a cause of birth defects (J. A. 13).

(2) On January 17, 1983, the District Court precluded evidence relating to two other Butler clients, Marco Cordova and Pauline Sand, who had birth defects similar to those of the infant plaintiff, but whose cases presented collateral issues relating to the taking of Bendectin as well as to the causes of their birth defects (J. A. 59-63). The District Court stated that it was "unwilling to grant plaintiffs a license to submit the birth defects of children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne Koller" (J. A. 60-61).

(3) On January 31, 1983, the District Court directed that plaintiffs' use of Drug Experience Reports ("DERs") submitted to the Food and Drug Administration ("FDA") would be limited to no more than five DERs, chosen from among those submitted to the FDA within one year after the birth of the children involved (J. A. 84-91).*

* The DERs are reports concerning birth defects in children of mothers who took Bendectin during pregnancy. They are received and investigated by defendant and submitted by it to the FDA. They differ from the usual reports of side effects of drugs in that (1) discovery of birth defects is not simultaneous with ingestion of the drug, and (2) over 2% of all live births have serious birth defects regardless of drug ingestion. The District Court recognized that the DERs are not a random sample and are not based upon any scientific methodology (J. A. 89). In order to limit collateral issues, the District Court restricted plaintiffs to a total of no more than five DERs (*ibid.*). Because the danger of self-serving DERs increases with the time elapsed between birth and the filing of the DERs, the District Court precluded the use of DERs filed more than one year after birth (J. A. 88).



After the entry of the first two orders described above and three days before the entry of the third, Butler took steps which resulted in the circumvention of all three of these orders of the District Court. At this time, the final pretrial of the action was scheduled to begin on January 31, 1983, to be followed immediately by the trial (J. A. 67-68, 91). Butler prepared a voluminous set of simulated DERs for 14 limbless children, accompanied by 3x5 photographs of each child taken in infancy (J. A. 250; C.A. App. 2850-3107). These simulated DERs were not prepared by physicians; they were prepared by Butler and they expressed his contentions as to the facts (*see* J. A. 137, 250). All 14 children were clients of the Butler firm (J. A. 129). They included Marco Cordova and Pauline Sand, the subjects of the District Court's order of January 17, 1983 (J. A. 98-127; C.A. App. 3019-3035). All of the children were more than one year old, with ages ranging from three to 19 (*see* C.A. App. 2850-3107).

Butler sent these simulated DERs and the photographs to Morton Mintz, a reporter for *The Washington Post*, as well as to the Commissioner of the FDA, the Surgeon General, and the defendant (J. A. 133-137, 249-250, 340-341). Butler followed up this release by giving an interview to Morton Mintz on February 1, 1983, the day after the entry of the third of the District Court's preclusion orders (J. A. 249-250).

Predictably, Butler's efforts resulted in a six-column article spread across the third page of *The Washington*

*Post* for February 7, 1983 (J. A. 129). The article highlighted Butler's charge that the 14 limbless children were victims of Bendectin, characterizing the 14 cases as a "new chapter" in a "controversy" concerning Bendectin (*ibid.*). It described in detail the deformities of Anne Koller and several of the other children (*ibid.*). The article referred specifically to the forthcoming trial of this case, stating that the trial "may begin this week in U.S. District Court here" (*ibid.*). It reported that Butler had obtained a $2.75 million jury verdict in a thalidomide case against the defendant for a legless child, and quoted Butler as saying that most of the 14 Bendectin cases had been referred to him by lawyers who knew of his prior thalidomide case (*ibid.*). The article also recalled the thousands of serious birth defects caused by thalidomide worldwide (*ibid.*).

While the *Washington Post* article did not publish any of the photographs Butler had supplied, it referred to them as the basis for its reported details (J. A. 129). Although the article noted that Butler's views were disputed by the FDA and the Public Citizen Health Research Group as well as by the defendant, the bulk of the article, as well as its six-column headline, elaborated Butler's contentions and described the multiple lawsuits brought by Butler and others (*ibid.*).

By using *The Washington Post* in this manner, Butler was able to transmit to prospective jurors in this case all three of the irrelevant and highly prejudicial categories of evidence which the District Court had ordered to be precluded: (1) thalidomide; (2) Marco Cordova, Pauline Sand, and other "children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne



Koller" (J. A. 60-61); and (3) self-serving DERs prepared by Butler himself long after the one-year cutoff period adopted by the District Court.

This material was not released to any other newspaper or correspondent (*see* J. A. 249-250). This fact, together with the timing of the release on the eve of trial, gave rise to a powerful inference that Butler's purpose in sending the material to *The Washington Post* was to disseminate it to prospective jurors in this case, thereby circumventing the evidentiary rulings of the District Court.

On February 7, 1983, the day the *Washington Post* article appeared, defendant moved for an order precluding the Butler firm from appearing in this case (J. A. 96-97). Butler responded to the motion with an affidavit averring that his sole motive in talking to *The Washington Post* was to get Bendectin off the market (J. A. 137). At the hearing on defendant's motion on February 17, 1983, ten days after the article appeared, the District Court asked Mr. Butler's co-counsel who argued the motion, Wiley A. Branton, Jr., to explain why Butler withheld his release until just before the scheduled trial date (J. A. 138). Mr. Branton admitted that he could not answer this question (J. A. 138-139). At the end of the hearing on February 17, 1983, the District Court inquired whether plaintiffs wished to present any witnesses (J. A. 139). Mr. Branton responded, "We do not wish to present anything further" (*ibid.*).

After the hearing on February 17, 1983, as described below, the District Court entered upon an evidentiary hearing as to possible misconduct by Allis. On April 29, 1983, the District Court entered an order to show cause why the Butler firm should not be disqualified on the

basis of misconduct by both Butler and Allis (J. A. 246-248). Butler was directed to show cause why his firm should not be disqualified because of his release of the 14 DERs and other information in an effort to prejudice the jury pool awaiting selection (J. A. 247).

Butler responded to the District Court's order to show cause with an affidavit dated May 24, 1983 (J. A. 249-253). He did not testify or present any evidence at the evidentiary hearing held in response to the District Court's order to show cause (*see* J. A. 323). In his affidavit, Butler attributed the timing of his release of the 14 DERs to *The Washington Post* to the need to obtain permission for the release from the families of the 14 children (J. A. 250). However, all 14 families were clients who had been referred "[o]ver the last two years" (J. A. 129), and work on the 14 DERs began as early as October 1982 (J. A. 250).

Moreover, this was not the first case in which Butler had used the press to communicate inadmissible evidence to the jury. There was undisputed evidence that Butler had used the press to place inadmissible evidence before the jury in a previous drug product liability case in 1975, near the end of two and one half months of trial. *Johnson v. SmithKline Corp.*, Ariz. Super. Ct., Maricopa County, Cause No. C266659 (J. A. 262-267).

**2. Allis**

On Wednesday, December 22, 1982, Krystyna Janowski, the secretary of Butler's partner Nicholas R. Allis, telephoned the offices of one of defendant's counsel and left two telephone messages (J. A. 17-20). Among other things, Ms. Janowski stated that the case was "fraudulent", and that



> "Mrs. Koller is lying when she says she took Bendectin from bulk order at Walter Reed Army Hospital. She did not take Bendectin till much later. . . ." (J. A. 19.)

Defense counsel attempted to arrange for a conference with the District Court, but were told by the District Court's law clerk that the Court was in recess until the following Monday, December 27, 1982 (J. A. 21, 94-95). Defendant's counsel obtained independent counsel, Carl J. Schuck of the firm of Overton, Lyman & Prince in Los Angeles, to represent and advise Ms. Janowski (J. A. 21-22, 31). By a letter delivered by hand on Monday, December 27, 1982, defense counsel advised the District Court and plaintiffs' counsel of these developments (J. A. 21-22).

Meanwhile, Ms. Janowski had second thoughts about the damage that might result to the Butler firm (J. A. 56-57). On Sunday night, December 26, 1982, she contacted the Butler firm and told it that she had been induced and pressured to contact defense counsel (J. A. 57-58).* On Monday evening, December 27, 1982, after repeated discussions with Ms. Janowski and with members of the Butler firm, Allis had Ms. Janowski sign under penalty of perjury a statement which he had previously prepared (J. A. 26-27, 58-59, 181-183). Without admitting any disclosures to defense counsel, the statement attributed any conversations with the defense to emotional distress on the part of Ms. Janowski, and asserted that defense representatives had attempted to

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* In subsequent testimony under oath, Ms. Janowski and defendant's representatives who dealt with her all denied any pressure or inducement (J. A. 56, 74-75, 141-142).

induce her to sign a false statement by promises of support (J. A. 26-27). The next day, Tuesday, December 28, 1982, after receiving a copy of defense counsel's letter to the District Court, Butler wrote to the District Court, elaborating Ms. Janowski's claim of having been approached by representatives of the defendant, and submitting the statement prepared by Allis and signed by Ms. Janowski (J. A. 23-28).

On January 3, 1983, Ms. Janowski's counsel wrote to the District Court that Ms. Janowski disavowed the statement she had signed for Allis on December 27, 1982, and that the statement was obtained under duress and on an offer by the Butler firm to continue payment of Ms. Janowski's full salary and fringe benefits, including hospitalization benefits for her premature baby (J. A. 29-30). Ms. Janowski appended a signed postscript confirming these facts (J. A. 30).

Beginning on January 12, 1983, Ms. Janowski's deposition was taken in Los Angeles under the supervision of a Special Master, the Honorable Gerard D. Reilly, retired Chief Judge of the District of Columbia Court of Appeals. The Special Master ruled that the attorney-client privilege did not apply to the issue of the timing of Mrs. Koller's ingestion of Bendectin, and this ruling was affirmed by the District Court (J. A. 68-73). Ms. Janowski testified at her deposition that Mrs. Koller had admitted to her that she did not take Bendectin as early as she had testified in this case, and that she had told Allis that she had communicated this fact to defense counsel (J. A. 52-56, 59, 80). Ms. Janowski further testified that Allis told her on December 27, 1982 that she could undo the damage she had done if she would sign a statement retracting what she had said (J. A. 59). She stated that Allis agreed that she would be continued as an employee



of the Butler firm without working in the office (J. A. 79). Ms. Janowski also testified that Allis told her that if she did not cooperate, the Butler firm would destroy her with her own past (J. A. 80).*

After reading Ms. Janowski's deposition, the District Court authorized a number of depositions of representatives of both plaintiffs and defendant on the issues raised by the Janowski deposition, as well as the false issues raised by her admitted earlier fabrications regarding the alleged conduct of defense representatives (J. A. 7, 8, 66-67, 154). These depositions were followed by those of Allis and one of defendant's counsel (J. A. 131, 154).

After reviewing these depositions, the District Court ruled that an evidentiary hearing should be held, limited to the conduct of Allis in procuring the statement from Ms. Janowski and its transmission to the Court (J. A. 155-158, 160-162). The District Court severed and left for trial the issue between Ms. Janowski and Mrs. Koller (*see* J. A. 153, 154, 157, 164). The District Court stated that the issue before it was "not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me" (J. A. 164).

At the evidentiary hearing held on March 10-16, 1983, Ms. Janowski was not called by either side. Plaintiffs presented no testimony, but defendant called, as hostile witnesses, Allis and other witnesses identified with the plaintiffs.

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* Ms. Janowski was in fact subjected at her deposition to brutal and prolonged cross-examination concerning aspects of her past life. This cross-examination did not succeed in shaking the testimony which Ms. Janowski gave on direct examination.

The District Court did not attempt hasty action with regard to either Butler or Allis. On April 29, 1983, it issued an order to show cause why the Butler firm should not be disqualified on the basis of misconduct by Butler and Allis (J. A. 246-248; *see* pp. 7-8 *supra*). Allis was directed to show cause why his firm should not be disqualified on the ground that Allis obtained the statement from Ms. Janowski

> "without regard for the truth of Ms. Janowski's retraction in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement." (J. A. 247-248.)

At the further evidentiary hearing held on May 31, June 30, and July 1, 1983 in response to the District Court's order to show cause, Allis testified again at length, together with six character witnesses and two expert witnesses on legal ethics. At the close of the evidentiary hearing, the District Court reserved decision.

In their testimony at the evidentiary hearings, Butler and Allis claimed that they did not learn until after the statement was obtained on December 27, 1982 that Ms. Janowski had told defense counsel that the case was fraudulent (J. A. 216-217, 219-220, 223, 238-239). This testimony of Butler and Allis was contradicted, however, by their client, Mrs. Koller, their co-counsel, Allen T. Eaton, and their investigator, Floyd T. Humphries, Jr., all of whom testified that Butler or Allis had told them on December 27, 1982, before the statement was obtained, that Ms. Janowski had telephoned defense counsel and stated that the case was fraudulent (J. A. 170, 199, 200-201).



The evidence before the District Court further established that the statement prepared by Allis, as signed by Ms. Janowski and transmitted to the District Court, was seriously misleading. The statement not only did not admit Ms. Janowski's disclosures to defense counsel, but asserted that notwithstanding improper inducements by defense representatives she had refused a statement (J. A. 26). It recited that Ms. Janowski had been promised no remuneration for the statement "or for anything else" (J. A. 27), but in fact Allis agreed that Ms. Janowski could continue to receive her salary without coming into the office and proposed having a typewriter sent to her apartment (J. A. 183, 210), and also agreed that on the succeeding Friday, December 31, 1982, she would receive her vacation pay check as well as a pay check for a period during which she had not worked (J. A. 183-184, 209, 292).

The statement also twice recited that Ms. Janowski's mind was "free and clear" when she signed it (J. A. 26-27), whereas in fact Butler believed that Ms. Janowski had "flipped" or was "crazy" (J. A. 212), while Allis believed that she was "a little bit emotionally unstable" (J. A. 176), "hostile" (J. A. 232), and "an emotionally somewhat unbalanced woman" (J. A. 186). The statement and Butler's covering letter to the Court both recited Ms. Janowski's improvised cover story that defense counsel had offered her bribes and inducements (J. A. 23-24, 26), even though Butler recognized on December 26 and 27, 1982 that he had no basis for making such charges and that to act on Ms. Janowski's unsupported allegations would be reckless (J. A. 218).

The evidence before the District Court included the tape recording surreptitiously made by plaintiffs' investi-

gator, Humphries, of portions of the discussion which he and Allis had with Ms. Janowski on the evening of December 27, 1982, when the statement was signed (J. A. 269-293).* Although the tape recording includes statements by Ms. Janowski repeating her earlier story, it also shows a clear intent to end further investigation (*see, e.g.*, J. A. 277-278, 279-280, 281-282). For example, Humphries told Ms. Janowski that if she could "just state that one simple fact", then "they're going to fold up their tent and go home, you know" (J. A. 286). The tape strongly suggests that the discussion was contrived. For example, as Humphries spoke of the desirability of a statement, Ms. Janowski said "bring me or send me such a statement or pull it out of your jacket pocket by coincidence—I have no problem" (J. A. 288). This statement was followed by loud laughter, in the midst of which Humphries said: "Pull it out Nick!" (*Ibid.*) Allis then suggested that Ms. Janowski might want to cross something out, and Ms. Janowski responded, "I have to cross something out to look like I did something." (*Ibid.*) Humphries interjected, amid renewed laughter:

> "T h a a t' s right! You understand. You understand! See . . . ." (*Ibid.*)

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* The surreptitious taping of conversations by an attorney has been the subject of general ethical condemnation. *See, e.g.*, ABA Committee on Ethics and Professional Responsibility, Formal Opinion 337 (1974) and Informal Opinion 1320 (1975); Los Angeles County Bar Association Legal Ethics Committee, Formal Opinion No. 272 (1962); New York State Bar Association Committee on Professional Ethics, Opinion No. 328 (1974). Under the circumstances of this case, it would also appear that the tape recording of the discussion on the evening of December 27, 1982 violated Section 632(a) of the California Penal Code (Pet. App. 97a-99a), and was not within the limited exception provided by Section 633.5 (Pet. App. 99a).



The conversation did not return to the statement until Ms. Janowski spoke of dating it just before Humphries switched off the tape recorder (J. A. 292-293).

### B. The Findings of the District Court

#### 1. Butler: Knowing Release of Inadmissible Evidence to Prejudice Defendant's Case and Circumvent the Court's Rulings

On the basis of all the facts before it, the District Court found that "Butler's knowing release to the Post of information previously ruled inadmissible by this Court was a flagrant circumvention of the orders of this Court" (Pet. App. 77a). The District Court further found that Butler's refusal to testify as to his motives supported its "conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (Pet. App. 78a). The District Court rejected plaintiffs' contention that Butler's conduct was protected by the First Amendment (Pet. App. 77a).

#### 2. Allis: Attempt to Thwart a True Investigation of a Crucial Witness in This Case

As described above, there was a conflict in testimony between Butler and Allis, on the one hand, and Mrs. Koller, Eaton, and Humphries, on the other hand, as to whether or not Butler and Allis knew on December 27, 1982 that Ms. Janowski had telephoned defense counsel and stated that the case was fraudulent (*see* p. 12 *supra*). The District Court resolved this conflict in testimony adversely to the credibility of Butler and Allis, finding that the primary if not the sole reason for Allis's conduct on December 27, 1982 was to obtain a retraction of Ms. Janowski's statements to defense counsel:

"Allis was not merely conducting an investigation in the interest of his clients and in fulfillment of his obligations to the Court as the credible and probative evidence in the record reveals that the primary, if not the only reason, Allis and Humphries visited Janowski on December 27, 1982 was to obtain a retraction. Assuming *arguendo* that securing a statement of retraction was not the sole reason for Allis' visit, the evidence shows that procuring a retraction was clearly a controlling factor in his decision to meet with Janowski. . . ." (Pet. App. 76a.)

On the basis of all the testimony it had heard, the District Court further found that Allis's conduct in procuring the statement from Ms. Janowski and presenting it to the Court without explanation was improper (Pet. App. 76a). The District Court further found that Allis's purpose in obtaining the statement and submitting it to the Court was not "to ascertain the truth" but rather "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a). The District Court concluded that this finding as to Allis's intent was supported by a number of factors, including

"1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his 'investigation'; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27." (Pet. App. 76a-77a.)



### 3. The Appropriateness of Disqualification

Having found that both Butler and Allis were guilty of misconduct, the District Court proceeded to consider the appropriate remedy.

It specifically found that if the Butler firm was disqualified, "remaining counsel can provide plaintiffs with competent counsel" (Pet. App. 78a). It observed that plaintiffs' remaining counsel of record included two of the attorneys who had represented the plaintiffs in the first Bendectin case to reach trial (*ibid.*). *See Mekdeci v. Merrell National Laboratories,* 711 F.2d 1510, 1516-24 (11th Cir. 1983). For these reasons, the District Court found that "[p]laintiffs' case would not be jeopardized by the disqualification of the Butler firm" (Pet. App. 78a).

The District Court also considered the effects of disqualification upon the Butler firm (Pet. App. 75a, 78a). It concluded that these effects "do not outweigh the strong public interest in maintaining the integrity of the judicial process" (Pet. App. 78a). Accordingly, the District Court ordered the disqualification of Butler, Allis, and their firm as counsel for plaintiffs in this case (Pet. App. 79a-80a).

## C. The Facts as Refound by the Court of Appeals

On appeal, the Court of Appeals (Circuit Judges Wald and Mikva, with District Judge Richey concurring "reluctantly" (Pet. App. 59a) in a separate opinion) discarded or ignored the findings of fact made by the District Court, and substituted new and different findings of its own.*

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* The majority of the Court of Appeals panel also gratuitously and unfairly criticized the District Court's inquiry as "one-sided" because it did not include certain actions of defense counsel which plaintiffs'

### I. Butler: "Some Question" as to Bad Intent

With regard to Butler, the Court of Appeals stated that it had "some question" about the District Court's finding that Butler acted with intent to prejudice the defendant and to circumvent the evidentiary rulings of the District Court (Pet. App. 51a). The Court of Appeals termed "plausible" Butler's belated explanation that he had to wait until January 1983 for the parents' authorization to release the 14 DERs (*ibid.*). It ignored the admission of Butler's counsel that he could not explain the timing of the release (*see* p. 7 *supra*). It concluded that the support for the District Court's finding of bad intent was not "unambiguous" (*ibid.*). However, the Court of Appeals nowhere stated that the District Court's finding as to Butler's intent was erroneous, let alone clearly erroneous.

The Court of Appeals complained that the District Court had made no finding as to the impact of Butler's action on the likelihood of a fair trial (Pet. App. 55a). Instead of remanding to the District Court for findings on this issue, the Court of Appeals made its own finding of fact:

> "We have no basis for believing that voir dire, a process designed in part to protect against prejudicial

counsel claimed were improper (Pet. App. 49a-50a). The panel stated that it was "in no position to ascertain whether any of these activities constituted misconduct", but implied that they should have been investigated (Pet. App. 50a). The fact is that the District Court permitted discovery as to the conduct of defense counsel simultaneously with the discovery concerning the conduct of plaintiffs' counsel, but found no basis to proceed further as to defense counsel (*see, e.g.*, J. A. 154, 165-166). Plaintiffs' counsel could have brought the matter before the District Court by motion in a timely fashion, as the District Court suggested (J. A. 93, 165). Instead of submitting their allegations to the test, plaintiffs' counsel chose to leave them as mere allegations which might muddy the waters.



> publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article." (*Ibid.*; footnote omitted.)

Defendant's petition for rehearing pointed out that there should be a remand for findings on this issue if the issue was deemed to be critical (pp. 7-8), but the Court of Appeals declined to remand the matter.

In its initial opinion, the Court of Appeals held that Butler did not violate Canon 20 of the District of Columbia Code of Professional Responsibility by sending inadmissible evidence to the press (Pet. App. 53a-56a). On July 16, 1984, the day before its denial of rehearing en banc (Pet. App. 84a-85a), the Court of Appeals amended its opinion to delete this holding, and replaced it with a statement that it had not determined whether or not Butler's conduct violated Canon 20 (Pet. App. 70a-71a). By way of conclusion, the Court of Appeals stated that "[w]hile Butler's decision to release the DERs to the press precisely when he did is not to be applauded," it could not furnish a basis for disqualification (Pet. App. 56a).

### 2. Allis: "On the Whole," No Misconduct

The District Court's central finding as to Allis was that he attempted "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a). Again, the Court of Appeals questioned this finding, but did not reverse it. The Court of Appeals acknowledged that "[t]here is authority for the proposition that surreptitious recording generally is unethical," and it stated that "this court does not sanction the practice" (Pet. App. 47a; footnote omitted). However, the Court of Appeals said that under the circumstances of this case, "Allis' actions in taping his

conversation with Janowski can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (*ibid.*).

The Court of Appeals similarly reviewed the other factors mentioned by the District Court, and indicated that it did not view them as the District Court had (Pet. App. 43a-47a). For example, the Court of Appeals dismissed the District Court's finding as to Ms. Janowski's "erratic behavior" on the evening of December 27, 1982 by saying that "we cannot find anything in Janowski's behavior that day that should have made it clear to Allis either that she did not understand what she was saying about Barnes' conduct and about the *Koller* case, or that what she was saying was untrue" (Pet. App. 44a).

The Court of Appeals stated that in the absence of any finding that Allis knew or that it was obvious that Mrs. Koller's testimony was false, it could find no impropriety in the statement obtained by Allis from Ms. Janowski (Pet. App. 42a). In making this statement, the Court of Appeals ignored the finding of the District Court that Allis's intent in obtaining the statement and presenting it to the Court without a full explanation was to thwart a true investigation of Ms. Janowski's testimony (Pet. App. 77a), an intent which rendered Allis's conduct improper regardless of whether he believed Ms. Janowski's testimony to be true or false.*

* It is well established that an attempt by a lawyer to thwart the investigation of a material witness constitutes an extremely serious violation of the basic obligations of an attorney. *See, e.g., United States v. Fayer*, 523 F.2d 661, 663 (2d Cir. 1975); *United States v. Madsen*, 148 F. Supp. 625, 628 (D. Alaska 1957); *People v. Kennelly*, 648 P.2d 1065, 1066 (Colo. 1982); *In re Crary*, 223 A.D. 277, 280, 228 N.Y.S. 340, 343-44 (3d Dep't 1928); *In re Rouss*, 169 A.D. 629, 631-32, 155 N.Y.S. 557, 559 (1st Dep't 1915), *aff'd*, 221 N.Y. 81, 116 N.E. 782 (1917), *cert. denied*, 246 U.S. 661 (1918). The court below sought to distinguish these cases on their facts (Pet. App. 42a-43a n.51), an attempt which ignored the basic principle for which the cases stand and upon which the District Court relied.



The Court of Appeals concluded that "[o]n the whole, we conclude that Allis' actions throughout the Janowski episode did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs" (Pet. App. 47a-48a; footnote omitted).

**D. The Decision of the Court of Appeals**

The Court of Appeals initially decided that notwithstanding the holding of this Court in *Flanagan v. United States*, 104 S. Ct. 1051 (1984), a disqualification order in a civil case may be appealed without waiting for a final judgment (Pet. App. 23a-33a).

The Court of Appeals did not find any of the District Court's findings of fact to be clearly erroneous, although (as described above) it freely engaged in *de novo* factfinding on appeal. Nor did it find that the District Court had abused its discretion. Instead, the Court of Appeals held that, as a matter of law, Butler and Allis could not be disqualified on the basis of their actions in this case (Pet. App. 56a).

Citing *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), the Court of Appeals held that disqualification should "rarely" be granted for misconduct not involving a past or present conflict of interest (Pet. App. 37a-38a). The Court of Appeals stated that "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's

interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel" (Pet. App. 38a). As examples of such other means, the Court of Appeals mentioned reprimands, contempt citations, and referrals to bar disciplinary bodies (Pet. App. 38a n.49).

**Summary of Argument**

1. It has long been established that the District Courts, in the exercise of their primary responsibility to supervise the conduct of attorneys appearing in cases before them, have the power to disqualify counsel for misconduct. The decision of the court below, by limiting disqualification to cases involving a past or present conflict of interest, would deprive the District Courts of this vital remedy. The suggestion of the court below that alternative means such as reprimands, contempt citations, and bar disciplinary proceedings will suffice to control premeditated misconduct by counsel ignores the serious practical difficulties standing in the way of effective professional discipline. Moreover, these alternative remedies are all retrospective and punitive in nature, in contrast to the prospective and preventive nature of the disqualification remedy. In cases such as the present case, disqualification is the only effective way to prevent the recurrence of willful misconduct by counsel.

2. The decision of the Court of Appeals ignored two basic limitations upon the scope of review of a Federal Court of Appeals: the clearly erroneous rule and the abuse of discretion standard of review.

Rule 52(a) of the Federal Rules of Civil Procedure mandates that findings of fact shall not be set aside unless



clearly erroneous. This Court has stressed again and again the importance of this rule. The Court has emphasized that the rule is of particular importance where, as here, the District Court heard oral testimony and lived with the case for a protracted period of time. The decision of the Court of Appeals violated all of these admonitions of this Court. Without holding any of the District Court's findings to be clearly erroneous, the Court of Appeals stated that it considered other findings to be more persuasive; made findings of its own rather than remanding for further findings by the District Court; and disregarded the findings of the District Court concerning the intent of Butler and Allis.

There is presently a conflict among Circuits as to whether the standard of appellate review of disqualification orders is the abuse of discretion standard or a stricter standard of review. In light of the fundamental principle that the District Courts have the primary authority and responsibility to supervise the counsel appearing before them, the correct standard of appellate review is the abuse of discretion standard. The action of the court below in substituting its own judgment for that of the District Court violated the abuse of discretion standard of review.

3. The court below questioned, but did not reverse, the finding of the District Court that Butler released inadmissible and prejudicial materials to *The Washington Post* with intent to circumvent the rulings of the District Court and to prejudice the defendant's case. The court below likewise did not reverse the finding of the District Court that Butler was guilty of misconduct.

In light of these findings, which must be taken as established for purposes of this appeal, the Court of

Appeals was wrong in holding that Butler was not subject to disqualification. This Court has repeatedly reaffirmed the power of the courts to prevent the public dissemination of inadmissible and prejudicial materials by attorneys and other officers of the court. The decision of the court below would destroy the most effective means available to the courts for preventing such deliberate misconduct.

The Court of Appeals held that Butler could not be disqualified in the absence of a finding of prejudicial impact upon prospective jurors. Even if this holding were correct, the case should have been remanded to the District Court for a finding on this issue. More fundamentally, the holding of the Court of Appeals ignores the fact that Butler intended and believed that there would be a prejudicial impact, and should not be relieved from the consequences of his acts merely because the Court of Appeals was not sure that there would be such an impact. The fundamental public interest in preserving the integrity and fairness of the judicial system requires that the courts be able to deal effectively with such misconduct.

4. In light of the holding of this Court in *Flanagan v. United States*, 104 S. Ct. 1051 (1984), orders disqualifying counsel in civil cases, like disqualification orders in criminal cases, are not appealable under the collateral order doctrine. The reasoning of this Court in *Flanagan* applies to disqualification orders in civil cases just as it does to disqualification orders in criminal cases. The decision of the court below would produce the anomalous result that of all types of orders granting or denying disqualification motions in civil and criminal cases, only orders granting such motions in civil cases would be appealable.



## ARGUMENT

### POINT I

**The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct.**

This Court has repeatedly emphasized the vital role of the Federal District Courts in the administration of justice in the Federal courts. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *Geders v. United States*, 425 U.S. 80, 86-87 (1976); *Link v. Wabash R.R.*, 370 U.S. 626, 629-33 (1962); *Quercia v. United States*, 289 U.S. 466, 469-70 (1933). Until the decision of the Court of Appeals in the present case, it was the law of each of the Circuits that the District Courts have the power to disqualify counsel in the exercise of their primary responsibility to supervise the conduct of the attorneys appearing in cases before them.* It was further

* *See, e.g., Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983); *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Dunton v. County of Suffolk*, 729 F.2d 903, 909 (2d Cir. 1984); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Kreda v. Rush*, 550 F.2d 888, 889 (3d Cir. 1977); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *In re Asbestos Cases*, 514 F. Supp. 914, 919-20 (E.D. Va. 1981), *aff'd without opinion by an equally divided court sub nom. Greitzer & Locks v. Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Musicus v. Westinghouse Electric Corp.*, 621 F.2d 742, 744 (5th Cir. 1980); *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 440 F. Supp. 193, 195-96 (N.D. Ohio 1976), *aff'd without opinion*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976); *Gilbert v. City of Little Rock*, 622 F.2d 386-87 (8th Cir. 1980); *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980); *Redd v. Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975); *Kesselhaut v. United States*, 555 F.2d 791, 794 (Ct. Cl. 1977).

established that this supervisory power of disqualification extends to cases involving misconduct by counsel, as well as to cases of past or present conflict of interest.*

The remedy of disqualification represents an exercise of "the elementary right of a court to protect its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety." *Laughlin v. Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). Disqualification differs from disbarment, which is also an inherent power of the Federal courts, *see, e.g., Theard v. United States*, 354 U.S. 278, 281 (1957), in that disqualification terminates only the right of the disqualified counsel to appear in a particular case, while disbarment terminates counsel's right to appear in any case in the court in which counsel is disbarred. *Cf., e.g., Brown v. Miller*, 286 F. 994, 997 (D.C. Cir. 1923).

During the last two decades, with the rapid increase in the complexity of litigation and the size of law firms, there has been a substantial growth in the number of motions made to disqualify opposing counsel on the ground of an asserted past or present conflict of interest. This growth in the number of disqualification motions on conflict grounds has led to expressions of judicial concern that such motions have sometimes been made for tactical

* *See, e.g., United States v. Snyder*, 707 F.2d 139, 145 (5th Cir. 1983); *United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); *United States v. Dinitz*, 538 F.2d 1214, 1219-23 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Laughlin v. Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945); *Viereck v. United States*, 130 F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds*, 318 U.S. 236 (1943); *United States v. Madsen*, 148 F. Supp. 625, 627-28, 632-33 (D. Alaska 1957).



reasons.* In *Board of Education v. Nyquist*, 590 F.2d 1241, 1245-47 (2d Cir. 1979), partially in response to such concerns, the Second Circuit held that disqualification should not be granted on the basis of an alleged appearance of impropriety arising from a conflict unless there is an actual past or present conflict of interest which would "taint" the trial of the action.

Until the decision of the court below, no court had extended the decision of the Second Circuit in *Nyquist* to hold that where there has been actual misconduct by counsel in the case before the court, disqualification may not be granted in the absence of a past or present conflict of interest. Such a holding represents an entirely unwarranted extension of the holding of the Second Circuit in *Nyquist*. *Nyquist* did not purport to destroy "the right of a court to protect its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety." *Laughlin v. Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). Since disqualification motions based on misconduct can only be brought where there has been serious misconduct by counsel, they do not involve the possibilities of tactical manipulation that have concerned some courts in the area of disqualification motions on conflict grounds.**

The decision of the court below, by holding that disqualification is barred in this case as a matter of law,

* *See, e.g., Evans v. Artek Systems Corp.*, 715 F.2d 788, 791-92 (2d Cir. 1983); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977).

** All of the expressions of concern over the possible tactical use of disqualification motions which were cited by the court below (Pet. App. 27a) involved disqualification motions based on alleged conflicts of interest, not misconduct of counsel.

would deprive the District Courts of a remedy which has long been recognized as a vital part of the remedies available to them to deal with misconduct by counsel.* Such a curtailing of the powers of the District Courts would be especially inappropriate in view of the growing recognition of the key role of the District Courts in preventing abusive conduct in actions pending before them. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976).

The court below suggested that the remedy of disqualification was not needed to deal with the problem of misconduct by counsel because alternative means such as reprimands, contempt citations, and bar disciplinary proceedings will suffice to control such misconduct. This suggestion ignores the lessons of history. In particular, it ignores the many serious practical difficulties standing in the way of effective professional discipline. *See, e.g.*, ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970).

Equally important, the suggestion of the court below ignores the fact that the alternative remedies suggested by that court are retrospective and punitive in nature, rather than prospective and preventive. The measures suggested by the court below are all limited to dealing with past

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* Apparently unwilling to admit that it was foreclosing altogether the possibility of disqualification for misconduct, the court below indicated that disqualification might possibly be granted for misconduct, albeit "rarely" and only "in cases of truly egregious misconduct" (Pet. App. 38a). However, the Court of Appeals did not describe any set of facts on which it would sustain disqualification for misconduct, and it made clear that disqualification would not be sustained here even if misconduct were found (*see, e.g.*, Pet. App. 50a-56a).



misconduct by counsel. They do not furnish the court with any means to prevent future misconduct by counsel with a demonstrated propensity for such misconduct. In the present case, for example, Butler has demonstrated in the past a willingness to abort a jury trial by transmitting inadmissible and prejudicial material to the press (*see* p. 8 *supra*). The alternative remedies suggested by the Court of Appeals would all require the District Court to run a high risk that Butler would resort to this tactic once again if he thought he was losing. The only means of removing this risk was the remedy selected by the District Court: the disqualification of Butler from further participation in this case.

## POINT II

**The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review.**

This case calls upon this Court to reaffirm once again the basic limitations upon the scope of appellate review by a Federal Court of Appeals. The Court of Appeals in this case proceeded as though the matter were before it *de novo*. Without paying any heed to the clearly erroneous rule, the Court of Appeals freely made factual findings different from those made by the District Court. Without concerning itself with the abuse of discretion standard of review, the Court of Appeals imposed its own conception of the proper outcome in this case.

### A. The Clearly Erroneous Rule

Rule 52(a) of the Federal Rules of Civil Procedure mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibil-

ity of the witnesses." This Court has stressed again and again the fundamental importance of this limitation upon appellate review of findings of fact made by the District Courts. *See, e.g., Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1959-60 (1984); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338, 339-41 (1949).

This Court has also emphasized that where an appellate court deems further findings of fact to be necessary, it should remand the case to the trial court for the making of such findings, rather than making such findings itself. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 & n.22 (1982), and cases cited; *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974).

The clearly erroneous rule applies to findings of intent and motive, just as it does to other findings of fact. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-89 (1982); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949). As the Court stated in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949), "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

This Court recently emphasized that the clearly erroneous rule applies with particular force in cases in which



findings of fact are based upon oral testimony and in which "trial judges have lived with the controversy for weeks or months instead of just a few hours." *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1959 (1984) (footnote omitted). In the present case, both of these factors giving special weight to the clearly erroneous rule are present.

The Court of Appeals in this case flouted all of the foregoing principles which this Court has repeatedly reaffirmed. Without holding any of the District Court's findings of fact to be clearly erroneous, the Court of Appeals said that it deemed other findings to be "plausible" or "more easily . . . understood" (*see* pp. 18, 19-20 *supra*). Instead of remanding for further findings to implement its newly expressed view of the law, the Court of Appeals made its own findings in areas not covered by those of the District Court (*see* pp. 18-19 *supra*). Even as to the intent of Butler and Allis, and despite the opportunity of the District Court to appraise their demeanor, the Court of Appeals disregarded the findings of the District Court (*see* pp. 18, 19-20 *supra*).

In short, the Court of Appeals knew what result it wished to reach in this case, and it rewrote the facts to match. If this were permitted, the clearly erroneous rule would be a dead letter.

**B. The Abuse of Discretion Standard**

Until recent years, it was generally accepted that because the District Courts have the primary responsibility for supervising the attorneys practicing before them (*see* pp. 25-26 *supra*), the standard of review on appeal of orders disqualifying attorneys should be abuse of discre-

tion.* This is still the rule in a number of Circuits.** Other Circuits, however, have begun to hold in recent years that, at least in some cases, the standard of review of attorney disqualification orders should be the clearly erroneous rule as to findings of fact, together with review for legal error as to issues of law.*** There presently exists a recognized conflict between the Circuits on this issue.****

In light of the fundamental principle that the District Courts have the primary responsibility for supervising the conduct of attorneys appearing before them, we submit that, while the subsidiary questions of fact and law involved in a District Court disqualification order should be subject to review under the standards applicable to

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* *See, e.g., Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1386 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *United States v. Clarkson*, 567 F.2d 270, 272 n.2 (4th Cir. 1977); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

** *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128, 131 (2d Cir. 1976); *Gilbert v. City of Little Rock*, 622 F.2d 386 (8th Cir. 1980); *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983); *Redd v. Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975).

*** *See, e.g., Richmond Hilton Associates v. City of Richmond*, 690 F.2d 1086, 1088 (4th Cir. 1982); *United States v. Snyder*, 707 F.2d 139, 143-44 (5th Cir. 1983); *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 711 (6th Cir. 1982); *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188-89 (7th Cir.), *rehearing granted*, 607 F.2d 194 (7th Cir. 1979) (en banc); *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 618-20 (11th Cir. 1983).

**** *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188 (7th Cir.), *rehearing granted*, 607 F.2d 194 (7th Cir. 1979) (en banc).



questions of fact and law generally, the ultimate determination by the District Court that the remedy of disqualification is appropriate should be subject to review under the abuse of discretion standard. This was the conclusion reached by the First Circuit after a recent and careful review of the conflicting decisions of other Circuits. *See Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984). This Court has repeatedly reaffirmed the applicability of the abuse of discretion standard in the closely analogous area of sanctions for discovery abuse. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). As Judge Friendly has written, the governing principle in such cases is that "[t]he district judge must be master of how to get cases to trial, and has had opportunities for frequent observation of the offending counsel which would not emerge from a cold record." Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 761 (1982).

In the present case the District of Columbia Circuit, which had previously applied a standard of abuse of discretion, *see Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983), aligned itself with the Circuits that have adopted a standard of review for legal error (Pet. App. 33a-34a & n.44). It then refound the facts in total violation of the clearly erroneous rule (*see* pp. 29-31 *supra*), and finally announced that on the basis of the facts it had found, it would be legal error to disqualify Butler and Allis (Pet. App. 56a).

In its relentless drive for reversal, the Court of Appeals simply ignored the District Court's careful weighing of the factors bearing upon its exercise of discretion on the

issue of disqualification (*see* p. 17 *supra*). In particular, the Court of Appeals utterly ignored the express finding of the District Court that plaintiffs' six remaining counsel of record were fully competent to represent them in the case (*see* p. 17 *supra*). In view of this uncontradicted finding, the determination of the District Court cannot be termed an abuse of discretion.

The opinion of the court below is a clear warning to the District Court that any attempt to invoke the remedy of disqualification against attorney misconduct will be met on appeal by an unbendingly hostile reception, in which the presumption will be against the action taken by the District Court, rather than in favor of it. This Court should reverse the decision of the Court of Appeals in order to make clear that the supervisory role of the District Courts cannot be so lightly brushed aside. This Court was presented with an analogous situation in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), in which the Court of Appeals had reversed the District Court's dismissal of an action for willful failure to provide discovery. The Court granted certiorari and reversed per curiam, holding that the Court of Appeals had erred by failing to apply the abuse of discretion standard of review. 427 U.S. at 642-43.



## POINT III

**The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent.**

The District Court found, on the basis of ample evidence, that Butler deliberately released irrelevant and prejudicial materials which had been ruled inadmissible by the District Court, in order to circumvent the Court's rulings and prejudice the defendant (*see* pp. 3-8, 15 *supra*). The Court of Appeals raised a "question" as to this finding, but did not (and could not) hold it to be clearly erroneous (*see* p. 18 *supra*). It must therefore be taken as established, for purposes of this appeal, that Butler acted with the intent to circumvent the District Court's preclusion orders and prejudice the defendant.

Such a deliberate attempt to prejudice prospective jurors with inadmissible evidence violates the provisions of the District of Columbia Code of Professional Responsibility, including Canon 20 and Disciplinary Rule 7-108(A) (Pet. App. 95a-96a). In its original opinion, the Court of Appeals expressed the view that there had been no violation of these provisions (*see* p. 19 *supra*). On July 16, 1984, however, the court below amended its opinion to state that it had not determined whether or not Canon 20 was violated (*see* p. 19 *supra*). Thus the finding of the District Court that Butler was guilty of misconduct stands unreversed by the Court of Appeals.

Given these findings, the present case is on all fours with *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968), a case involving the well-known criminal defense counsel F. Lee Bailey. After

failing to persuade the trial court to permit the introduction into evidence of the results of polygraph tests of the defendants, Bailey sent a letter to the Governor of New Jersey, with copies to over 150 other persons, attacking the conduct of the cases and revealing the results of the polygraph tests. While Bailey (unlike Butler in this case) apparently did not himself transmit his letter to the press, the New Jersey Supreme Court understandably refused to "credit Mr. Bailey's amazement that someone turned the letter over to a reporter." 52 N.J. at 14, 243 A.2d at 229.

The New Jersey Supreme Court held that Bailey was properly disqualified on the basis of this misconduct. In words equally applicable to the present case, the New Jersey court stated:

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial both for a defendant and for the State. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." 52 N.J. at 18, 243 A.2d at 231.



The court below tried to distinguish *State v. Kavanaugh* on the basis of the finding of the New Jersey court that there was no evidence that Bailey would "stay in bounds" (Pet. App. 56a). But there is likewise no evidence on the basis of which any finding could be made that Butler would "stay in bounds". Butler's position throughout has been an unrepentant insistence that he had a perfect right to do what he did (J. A. 137, 249-250). Butler has a past record of using the press to disseminate inadmissible evidence to jurors (*see* p. 8 *supra*). On the record in this case, Butler presents an even greater danger of recidivism than Bailey did in *State v. Kavanaugh*.

The issue presented by this case is of great importance to the administration of justice. Once inadmissible evidence has been leaked to the press, it is as a practical matter impossible to salvage a fair trial by restraining the dissemination of the information by the press. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-45 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-70 (1976). Accordingly, if the right to a fair trial is to be protected against the dissemination of inadmissible evidence, officers of the court such as Butler must be restrained from leaking such information to the press. As shown below, this Court has repeatedly held that such restraints are inherent in the role of attorneys as officers of the court.

In an often-quoted opinion by Mr. Justice Holmes in *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907), the Court declared:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court expressly reaffirmed the power and the duty of the courts to prevent the public dissemination of inadmissible evidence by officers of the court. This Court stated:

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . ." 384 U.S. at 361.

The Court made clear that it regarded such restraints upon extrajudicial statements by officers of the court as mandatory in the interests of justice. 384 U.S. at 363.

In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), both the majority and the concurring opinions reaffirmed the holding of *Sheppard v. Maxwell*. Mr. Chief Justice Burger stated in his opinion for the majority:

> "This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See *Sheppard* v. *Maxwell*, *supra*, at 361-362. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. [Citation and footnote omitted.]"* 427 U.S. at 564.



Mr. Justice Brennan's concurring opinion likewise reaffirmed the power of the courts to limit the dissemination of information by lawyers and other officers of the court:

> "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U. S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. Cf. *New York Times Co.* v. *United States*, 403 U. S., at 728-730 (STEWART, J., joined by WHITE, J., concurring). Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel." 427 U.S. at 601 n.27.

*See also, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

The court below attached significance to the fact that there was no order of the District Court expressly prohibiting Butler from disseminating inadmissible and prejudicial materials to the press (Pet. App. 51a-52a & n.63). But such an order has never been deemed a precondition to

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* In a footnote appended at this point, the Chief Justice noted that counsel for the news media in *Nebraska Press Ass'n v. Stuart* had argued that such restraints upon officers of the court would be unconstitutional, and stated, "We are not now confronted with such issues." 427 U.S. at 564 n.8. As described below, Mr. Justice Brennan's concurring opinion found this argument to be insubstantial.

the obligation of an attorney, as an officer of the court, to refrain from disseminating inadmissible and prejudicial materials. *See, e.g., Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907). In *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966), this Court cited with approval the holding of *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965), that Canon 20 of its own force prohibits the divulging of prejudicial matters by a lawyer (*see* p. 38 *supra*). *Cf., e.g., Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975).

The holding of the court below as to Butler was that, even assuming that Butler had committed a deliberate violation of the Code of Professional Responsibility, he could not be disqualified in the absence of a finding that his actions had made a fair trial impossible (*see* pp. 18-19 *supra*). The Court of Appeals was clearly wrong in holding that the District Court's power to disqualify Butler should depend upon a showing that specific potential jurors have been tainted. There is no suggestion in this Court's opinions in *Sheppard v. Maxwell* and *Nebraska Press Ass'n v. Stuart* that there is any such limitation upon the power of the courts to restrain prejudicial publicity by officers of the court. The limitations upon the means available to the courts to detect a prejudicial impact upon prospective jurors are serious and well recognized. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, *J.*, concurring).

By deliberately using the press to prejudice the jury venire, as found by the District Court (*see* pp. 3-8, 15 *supra*), Butler manifested his belief that he would succeed in tainting the jury, as well as his intention to do so.



Butler is an experienced drug product liability lawyer (*see* J. A. 252), and his belief that his actions would succeed in prejudicing the jury is the proper basis for judicial action, not the contrary speculation of the Court of Appeals (Pet. App. 55a).

Even if the Court of Appeals had been correct in demanding a finding of prejudicial impact upon the jury, the question of what finding should be made on this issue was a question for the informed determination of the District Court, not the Court of Appeals. *Cf., e.g., Patton v. Yount*, 104 S. Ct. 2885, 2891-92 (1984). By reaching out to make a *de novo* finding on this issue itself, rather than remanding to the District Court for such a finding, the Court of Appeals violated the repeated admonitions of this Court (*see* pp. 29-31 *supra*).

Moreover, the factual finding of the Court of Appeals that the materials disseminated by Butler would not irretrievably prejudice the defendant was clearly erroneous. The Court of Appeals erroneously stated that the release of material directed to potential jurors poses less danger before they have been selected to serve on the jury than after selection (Pet. App. 55a). The court cited no authority for this view, which is contrary to *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968). In actuality, the danger of prejudicial impact upon jurors is greatest after they have been called for service and before they are protected by the supervision and instructions of the trial judge. *Cf., e.g., Marshall v. United States*, 360 U.S. 310, 313 (1959). What prospective jurors read at this time strikes them as a matter of first impression before they have heard the openings of counsel and the cautions of the trial court. A subsequent voir dire might have disclosed who read the

article, but it would have confronted defendant with the dilemma of accepting a tainted jury or a jury of non-readers in a case dependent upon scientific evidence.

The decision of the court below as to Butler should be reversed. If permitted to stand, the decision below would destroy the most effective means available to the courts for preventing the deliberate dissemination to prospective jurors of irrelevant and prejudicial evidence.

## POINT IV

**Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan v. United States*, 104 S. Ct. 1051 (1984).**

Under 28 U.S.C. § 1291, the jurisdiction of the United States Courts of Appeals extends to appeals from "all final decisions of the district courts of the United States, . . . , except where a direct review may be had in the Supreme Court." This Court emphasized in *Flanagan v. United States*, 104 S. Ct. 1051, 1054 (1984), that the final judgment rule is "crucial to the efficient administration of justice."

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the Court held that the final judgment rule does not bar interlocutory review of the "small class" of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Three conditions must be met before an interlocutory order can come within the *Cohen* exception:



> "First, it 'must conclusively determine the disputed question'; second, it must 'resolve an important issue completely separate from the merits of the action'; third, it must 'be effectively unreviewable on appeal from a final judgment.' *Coopers & Lybrand v. Livesay*, 437 U. S. 463, 468 (1978) (footnote omitted)."

*Flanagan v. United States*, 104 S. Ct. 1051, 1055 (1984).

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-78 (1981), the Court held that an order denying a motion to disqualify counsel in a civil case was not appealable under the *Cohen* doctrine. The Court expressed no view as to the appealability of an order granting a motion to disqualify counsel, or of an order denying such a motion in a criminal case. 449 U.S. at 372 n.8.

During the three-year period that elapsed between the Court's decision in *Firestone Tire & Rubber Co. v. Risjord* and its recent decision in *Flanagan v. United States*, 104 S. Ct. 1051 (1984), all of the Courts of Appeals that passed upon the question held that orders disqualifying counsel in civil cases were appealable under the *Cohen* doctrine.* Similarly, with only one exception,

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* *See, e.g., Groper v. Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983); *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 n.2 (2d Cir. 1981); *Greitzer & Locks v. Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 706 (6th Cir. 1982); *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717-21 (7th Cir. 1982); *Gough v. Perkowski*, 694 F.2d 1140, 1141-45 (9th Cir. 1982); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1356-58 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); *Norton v. Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir. 1982), *rehearing denied*, 700 F.2d 617 (11th Cir. 1983).

all of the Courts of Appeals that passed upon the issue held that disqualification orders in criminal cases were likewise appealable under the *Cohen* doctrine.*

In *Flanagan v. United States*, 104 S. Ct. 1051 (1984), this Court unanimously held that orders disqualifying counsel in criminal cases are not appealable under the *Cohen* doctrine. During the period since the *Flanagan* decision was rendered, the Courts of Appeals have divided concerning the impact of the *Flanagan* decision on the appealability of disqualification orders in civil cases. In *Oneida Indian Nation v. New York*, 732 F.2d 259, 261 (2d Cir. 1984), the Second Circuit stated that *Flanagan* "certainly calls into question the continuing validity of the rule permitting interlocutory appeal of a disqualification order entered in a civil case." In *Interco Systems, Inc. v. Omni Corporate Services, Inc.*, 733 F.2d 253, 255 (2d Cir. 1984), the Second Circuit decided to continue to allow such appeals "until the issue is otherwise specifically determined by the Supreme Court." In the decision below, the District of Columbia Circuit held that disqualification orders in civil cases are appealable despite the *Flanagan* decision (Pet. App. 23a-33a). In *Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984) (2-1), the Fifth Circuit held that civil disqualification orders are not appealable in light of *Flanagan*.** Finally, in a decision which did not manifest any awareness of *Gibbs v. Paluk*,

* *See Flanagan v. United States*, 104 S. Ct. 1051, 1053-54 n.2 (1984), and cases cited.

** In their Supplemental Brief in Response to Petitioner's Supplemental Brief (p. 2), respondents stated that the decision of the Fifth Circuit in *Gibbs v. Paluk* was not final. This is no longer the case. The appeal in *Gibbs v. Paluk* was dismissed on October 10, 1984, and rehearing and rehearing en banc were denied on November 8, 1984. The mandate has been stayed pending the decision of this Court in the present case.



the Federal Circuit followed the holding of the court below. *Panduit Corp. v. All States Plastic Manufacturing Co.*, Dkt. No. 84-569 (Fed. Cir. Sept. 25, 1984).

The holding of this Court in the *Flanagan* case was stated in terms of disqualification orders in criminal cases. *See* 104 S. Ct. at 1053, 1057. Moreover, the opinion of the Court in *Flanagan* reaffirmed the particular importance of the final judgment rule in criminal cases. *See* 104 S. Ct. at 1054-55. On the other hand, as shown below, the reasoning of this Court in *Flanagan* applies to civil cases just as it does to criminal cases.

This Court based its analysis of the *Cohen* criteria in *Flanagan* upon two alternative assumptions: (1) that if the disqualification order was eventually held to be erroneous on an appeal from a final judgment, the judgment would automatically be reversed without any need for a showing of prejudice; and (2) that a showing of prejudice would be required.* On the first assumption, the Court held, a disqualification order "does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" 104 S. Ct. at 1056. On the second assumption, the Court held, the second *Cohen* criterion would not be satisfied, because the issue of disqualification would not be completely separate from the merits of the case:

> "On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until

* The Court held that for purposes of its decision on appealability, it did not need to resolve whether or not a showing of prejudice would be required. 104 S. Ct. at 1056 n.4.

> trial is complete. The effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known. . . ." 104 S. Ct. at 1057.

The same reasoning also applies to disqualification orders in civil cases. If such orders are viewed as subject to reversal without any showing of prejudice—an approach which has no support in precedent and which was rejected by the court below (Pet. App. 28a-29a)—then, as in the first alternative considered by the Court in *Flanagan*, such orders would fail to meet the third *Cohen* criterion of effective unreviewability on appeal from a final judgment. On the other hand, if disqualification orders in civil cases are subject to reversal only on a showing of prejudice, then, as in the second alternative considered by the Court in *Flanagan*, the issue of prejudice cannot be divorced from a consideration of the entire record after the entry of final judgment.

Moreover, as pointed out by Judge Alvin B. Rubin in *Gibbs v. Paluk*, 742 F.2d 181, 185 (5th Cir. 1984), a holding that civil disqualification orders are appealable, when all other orders relating to disqualification are not appealable, would create an anomalous situation:

> "Whether orders denying disqualification in both civil and criminal cases are appealable has been decided. Whether orders granting disqualification in criminal cases are appealable has been decided. It would be anomalous to hold that in this domain there remains one exception: disqualification in a civil case is different. Neither language, nor logic, nor policy appears to us to warrant such an oddity. . . ."



The court below declined to apply the reasoning of *Flanagan* to civil cases, essentially on the ground that it would supposedly be impossible to show prejudice from a disqualification order at the end of the case (Pet. App. 28a-32a). The same argument was made by the losing parties in *Flanagan*,* and it has no more validity here than it did in *Flanagan*. Moreover, the reasoning of the court below does not in fact escape the logic of *Flanagan*. If a showing of prejudice is to be dispensed with, as the court below held, then, as in the first alternative considered by this Court in *Flanagan*, the third *Cohen* criterion of effective unreviewability on appeal from a final judgment is not met.

In support of its position, the court below argued that there is no counterpart in civil cases to the Sixth Amendment right to counsel in criminal cases (Pet. App. 31a-32a). If anything, however, this fact cuts against, rather than in favor of, allowing an automatic right of interlocutory appeal of disqualification orders in civil cases when there is no such right in criminal cases.**

The present appeal dramatically illustrates the unwisdom of permitting interlocutory appeals from disqualification orders in civil cases. The appeal has already delayed the further progress of the case for almost a year. It has drawn the Court of Appeals into an ill-informed

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* *See* Reply Brief for Petitioners, pp. 2-3, 8-10, *Flanagan v. United States*, 104 S. Ct. 1051 (1984).

** The Court of Appeals also suggested that counsel should have a right to appeal a disqualification, and not merely their clients (Pet. App. 32a-33a). This suggestion ignored the fact that the interest of disqualified counsel in appealing a disqualification order is no greater in civil cases than in criminal cases. Moreover, even if it were sound, this suggestion would go only to the issue of standing to take an appeal, not to the issue of the time when the appeal should be taken.

and fragmentary prejudgment of some aspects of the case. In the absence of this appeal, the trial would have gone forward with the six counsel of record for plaintiffs who were not affected by the District Court's disqualification order. By this time, the results of the trial would be known, and any appeal of the disqualification order could have proceeded against a full record encompassing the case as a whole, and not merely pieces of it.



## CONCLUSION

For the reasons given in Points I-III above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to affirm the order appealed from. In the alternative, for the reasons given in Point IV above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to dismiss the appeal.

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Respectfully submitted,

LAWRENCE E. WALSH
Crowe & Dunlevy
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
*Counsel of Record for Petitioner*

RICHARD C. FORD
*Of Counsel*

GUY MILLER STRUVE
OGDEN N. LEWIS
WHITNEY L. SCHMIDT
Davis Polk & Wardwell
1575 I Street, N.W.
Washington, D.C. 20005
(202) 789-7100

VINCENT H. COHEN
ROBERT B. CAVE
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500
*Counsel for Petitioner*